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Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 142.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

ELIZABETH VAN ZANT,
Respondent.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

Statement.

A writ of *certiorari* was issued herein on October 17, 1921, to the Supreme Court of Missouri to review its decision affirming a judgment in the sum of $8,000.00 for personal injuries in favor of Elizabeth Van Zant, known also as Mrs. L. A. Goodrich (Rec. 11), who, for convenience, will be referred to as the plaintiff, against the petitioner, which will be referred to as the defendant. The sole question involved is the validity of a stipulation in a free interstate railway pass upon which plaintiff was being transported at the time she received the in-

juries complained of, by the express terms of which she agreed to assume "all risk of accident and damage to person and baggage".

The facts are simple and undisputed. The plaintiff and her son, John M. Goodrich, constituted a family residing at Pittsburg, Kansas. The son was employed by the defendant as a flue borer in its round house at that place (Rec. 12), and supported his mother. Upon the request of the son, the defendant, in August, 1917, issued a free interstate pass to the plaintiff from Pittsburg, Kansas, to Howe, Oklahoma (Rec. 16). This pass carried on its back the following conditions, which were assented to by the plaintiff by signing her name thereunder:

CONDITIONS.

Good for stop-over at will on application to conductor.

This pass is not transferable, must be signed in ink by the holder thereof, and *the person accepting and using it thereby assumes all risk of accident and damage to person and baggage.*

Forfeited if presented by other than person named and may be revoked without notice.

The above conditions are hereby agreed to. I also represent and declare that I am not prohibited by Federal and State laws from receiving free transportation and this pass will be lawfully used.

While making an interstate trip on this pass the plaintiff received injuries at a point in the state of Missouri, by falling from her seat into the aisle of the car by reason of the jarring or jolting of the train, due apparently, but not certainly, to some derailment or wreck (Rec. 10). There was no claim in the petition and no evidence that the defendant was guilty of wanton or wilful negligence.

Under the law, as declared by the State courts

of Missouri, where the accident occurred, the conditions on the back of the pass by which the user assumes risk of accident and damage to person are held to be void as against public policy. A different rule prevails in the Federal courts, which hold that stipulations in free passes, such as the one here in question, are valid and binding. The defendant insists that the pass in question was issued under an Act of Congress, known as the Hepburn Act of June 29, 1906, and that the stipulation against liability is governed by the rule of the Federal courts.

The defendant in its answer pleaded the release above quoted in bar of the action, but its plea was overruled and judgment rendered by the Circuit Court of Jasper County, Missouri, against the defendant in May, 1919, in the sum of $8,000.00. An appeal was taken to the Supreme Court of Missouri, and in June, 1921, the judgment of the Circuit Court was affirmed. The Supreme Court held that the release in question was governed by State laws, saying (R. 24):

> Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States.

The defendant contends that the Supreme Court of Missouri has erred in its conclusions and earnestly insists that the plaintiff's stipulation to assume all risk of accident and damage to person is valid and binding, and that it constitutes a complete bar to her claim for damages.

Specification of Errors.

1. The Supreme Court of Missouri erred in entering judgment affirming the judgment of the Circuit Court of Jasper County, Missouri, and, in effect, holding that a stipulation in a free interstate railway pass, issued under the Hepburn Act of June 29, 1906, that the holder assumes all risk of accident and damage to person is void and of no effect; and in failing to hold that such a stipulation is valid and binding.

2. The Supreme Court of Missouri erred in holding that the validity of the stipulation in a free interstate railway pass, issued under the Hepburn Act of June 29, 1906, in which the holder assumes all risk of accident and damage to person is to be determined by the law of the State rather than by the rules of liability which obtain in the Federal courts.

3. The Supreme Court of Missouri erred in failing and refusing to hold that Congress in passing the Act to Regulate Commerce and the amendments thereof, and particularly the amendment of June 29, 1906, intended to take possession of the subject of free interstate passes, including the subject of the liability of the carrier for personal injuries sustained while using such form of transportation in an interstate journey.

4. The Supreme Court of Missouri erred in not reversing the judgment of the Circuit Court of Jasper County, Missouri, upon the ground that the stipulation in the pass upon which the plaintiff was riding at the time was valid and binding and constituted a complete bar to any recovery.

BRIEF.

By the Act of June 29, 1906, Congress assumed possession of the subject of free interstate passes, including stipulations contained therein affecting the liability of carriers to persons riding thereon in interstate journeys, and thereby superseded all State control of the subject.

The original Act to Regulate Commerce, passed in 1887, did not expressly prohibit free transportation, and it was only when such transportation constituted discrimination and was not in the exception contained in section 22 of the Act that it was illegal. The first general prohibition of free transportation, and the first express authorization of free transportation, except in certain specified instances permitted by section 22, appeared in the amendment of June 29, 1906, which, for convenience, is here reproduced:

> No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and home-

less persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such homes; to necessary care takers of live stock, poultry and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents; witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an act entitled "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three and any amendment thereof.

In the Act of April 13, 1908, a proviso was added expanding the meaning of the word "employees", as follows:

> Provided further, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier.

In the amendment of June 18, 1920, which is not involved herein, a further proviso was added making provision for the exchange of passes or franks with telegraph, telephone and cable lines.

Section 22 of the Act to Regulate Commerce of 1887, as subsequently amended, made provision for free or reduced rates of transportation in certain limited instances. Omitting the provisions relative to interchangeable 5,000-mile tickets, the section as amended reads as follows:

> That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be

> construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act.

The evident purpose of Congress in its amendment of 1906, above quoted, was to bring the whole subject of interstate transportation under direct national control. The issue of free transportation, unregulated except by the general anti-discrimination provisions of the original Act to Regulate Commerce of 1887, and by the several States whose efforts to enforce their statutes were not attended with great success, had resulted in gross discrimination. The evils of the practice were pointed out in the first annual report of the Interstate Commerce Commission (1 I. C. R. 650-654). In its third annual report to Congress, in 1889, the Commission, in the course of a long discussion on the subject, said:

> The statute undoubtedly was framed to prohibit passes or free transportation of persons,

> as one of the forms of unjust discrimination, favoritism, and misuse of corporate powers that had grown into an abuse of large proportions and become demoralizing in its influence and detrimental to railroads, both in loss of revenue and in provoking public hostility. * * * The lav aims at the correction of the abuses of free transportation, and, in accomplishing this general purpose, some forms of free or reduced transportation that at first view might appear plausible, or even unobjectionable in themselves have to fall under its general restrictions. * * * The discrimination is equally unjust whether the free transportation be complimentary or to aid some person's business, or for some supposed indirect advantage to the carrier. The correction of the evil, and the equality of right to which all are entitled, required the restrictions to be general and sweeping to furnish any substantial assurance that the abuse should not be continued or new ones devised under cover of any discretion left to the carrier.

State legislation could not be expected to remedy the evils of free interstate transportation. In the nature of things, such legislation would not be uniform either in its restrictions or its methods of enforcement. The general anti-discrimination provisions of the original Act had afforded no relief. National legislation of a comprehensive character, therefore, was imperatively necessary to provide one uniform rule covering the subject of free transportation, and one uniform method of its enforcement. The amendment of 1906 was responsive to this demand.

Congress, we contend, reached out and took over the entire subject of free interstate transportation, specifying with particularity the persons to whom it might lawfully be issued and providing penalties for infractions of the law on the part of the indi-

vidual as well as on the part of the carrier. This of necessity deprived the states of all power or authority to legislate with respect to such transportation. The exertion of national power would be frustrated and nullified if authority remained in the several States to encroach upon or in any manner to affect the subject matter with conflicting statutes or decisions. The Federal power became supreme not only over the subject of the issuance of free transportation, but also over all matters directly relating thereto, such as the terms and conditions on which such transportation should be issued.

The stipulation in a free interstate pass releasing the railway company from liability is a part and parcel of the pass itself. The pass is a license, and the person to whom it is issued is a licensee (*Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440-454), and the terms and conditions on which it is issued and given validity are an integral part of the license itself. A release of all claims for personal injuries has always been a condition to the use of free transportation. Such a stipulation was upheld in 1858 (*Welles* vs. *Ry. Co.*, 26 Barb. 641; affirmed 24 N. Y. 181). The carrier waives its right to compensation, and the pass holder waives his right to claim damages for injury to his person or his property. The stipulation ordinarily appears upon the back of the pass, which the user is required to agree to and sign before the pass has any validity whatsoever. Until it is signed, the pass is incomplete and is not valid for transportation.

The pass in this case might well have said on its face, "Pass Mrs. L. A. Goodrich from Pittsburg to Howe, but only on condition that in consideration of the license hereby granted, she release the Railway Company from all claims for damages growing out of any personal injuries she may sustain." The

legal effect would have been precisely the same. The fact that the release was on the back of the pass instead of on its face is of no consequence. The *pass* consisted of writing and printing on both sides of the paper. This was the *pass* over which Congress assumed jurisdiction by the amendment of 1906. That part of the pass which consists of the release, equally with that part which authorized the plaintiff to travel free from Pittsburg to Howe, was thus withdrawn from the domain of State legislation.

Congress is presumed to have known that from the very beginning a release from claims for personal injuries was a part and parcel of every free pass, and to have enacted the 1906 amendment with that fact clearly in view. The passenger might elect to pay his fare, in which event he disabled the company from contracting against its negligence; but if he accepted the privilege of free transportation, he did so at his own risk of personal injury. The release was a universal incident to every free pass, and it cannot be assumed that Congress did not intend by the amendment of 1906 to place the entire pass—release and all—under Federal authority and jurisdiction.

Indeed, in February, 1904—some two years before the 1906 amendment,—this court, in *Northern Pacific Ry. Co.* v. *Adams, supra,* had occasion to construe a railway pass containing the usual release clause, and held that the stipulation in the pass agreeing that the railway company should not be liable for injury to the person, was valid and binding. The court there said (pp. 451; 453-454):

> The question, then, is distinctly presented whether a railroad company is liable in damages to a person injured through the negligence of its employees, who at the time is riding on

> a pass given as a gratuity, and upon the condition, known to and accepted by him, that it shall not be responsible for such injuries. * * *
>
> In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to the common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

Again, in March, 1904, this court decided the case of *Boering* v. *Chesapeake Beach R. Co.*, 193 U. S. 442, where, following the *Adams* case, *supra*, it was held:

> A stipulation in a free railway pass, requiring the user to assume the risk of injury due to the carrier's negligence, is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

Congress is presumed to have enacted the amendment of 1906 with full knowledge of these deci-

sions. It knew that the usual release stipulation was an integral part of the pass itself, and that the use of a free pass involved a waiver on the part of the carrier of its compensation, and likewise a waiver on the part of the user of the pass of any claim for damage to his person. It may also be assumed that Congress knew of the conflicting rules of State decisions and conflicting State statutes, some of which gave and others denied compensation. Under these circumstances, it was the part of wisdom for Congress to assume jurisdiction of the entire subject matter, prescribing one uniform rule for the use of free interstate transportation, and likewise one uniform rule affecting the validity of the ordinary stipulation relieving the carrier of liability for personal injuries. This, we submit, is what was accomplished by the Act of June 29, 1906, with the result that the State statutes and State decisions affecting the subject were superseded by the Federal statute and the Federal rule of nonliability.

The validity of a stipulation against liability contained in a free interstate pass issued by a railway company under the Act of June 29, 1906, came before this court (*Charlestown R. Co.* v. *Thompson,* 234 U. S. 576) upon writ of error to the State Court of Georgia. A recovery had been had in the lower court, and this was affirmed upon appeal. In this court it was urged, as appears from the brief of defendants-in-error (58 L. ed. 1478) that "liability under free pass is a State, and not a Federal, question." It was held, however, that a Federal question was presented, and the motion to dismiss was overruled. Upon the merits, it was held that the pass there in question was issued gratuitously, and

that the stipulation contained therein relieving the carrier from liability was valid and binding, the ruling being accurately reflected in the syllabus (58 L. ed. 1477), as follows:

> A railroad carrier may validly stipulate in a pass for interstate transportation issued gratuitously to the wife of an employee under the authority of the Act of June 29, 1906, section 1, that it shall not be liable for negligent injury to her person.

In this case, the Supreme Court of Missouri has reached what we consider to be an erroneous conclusion in holding that Congress has not legislated with respect to "the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and that, therefore, these matters remain the subject of regulation by the several states." In other words, the State court holds that the terms and conditions upon which a free pass is issued, and which are incorporated in and made a part of such pass, are within the control of the several states. Although a free pass may be issued pursuant to an exertion of Federal authority, nevertheless, it is said, it remains for the several states to say which of the conditions, terms and limitations contained in the pass are valid and which are invalid.

But it is entirely clear that if the several states may control the terms and conditions upon which free interstate passes are issued, they may defeat the operation and effect of the act of Congress. Not only may the several states invalidate the stipulation in an interstate free pass relieving a carrier from liability for personal injuries, but they may likewise affect its other terms and conditions. For

illustration, a pass is ordinarily conditioned that it may not be used for passage upon fast limited trains, such as the Congressional Limited, the Twentieth Century Limited, the Broadway Limited or the California Limited; may State authority override this limitation and validly provide that all, or any designated class of interstate passes shall be accepted upon these limited trains, as well as upon all trains? A pass is ordinarily conditioned to be non-transferable and subject to forfeiture if presented for passage by any other than the person to whom it was issued. Is the validity of these provisions to be tested by State statutes and decisions of State courts? Passes also contain a time limit, during which they are valid for passage. Is this likewise subject to State regulation? Following the passage of the Act of June 29, 1906, the Interstate Commerce Commission formulated and promulgated various rulings relative to the issue of free interstate transportation, prescribing its form, designating the persons who come within its provisions, defining the word "family" as used in the Act, etc. (*Watkins on Shippers and Carriers,* Third Edition, Volume I, pp. 648-652). May these rulings and regulations be amended or repealed or superseded by State authority? Many other illustrations might be given.

Such an admixture and intermingling of Federal and State authority would be intolerable. Federal control of interstate transportation would be nullified by State enactments; and Federal laws, instead of being supreme, would become subordinate to State authority. The confusion that would result is aptly illustrated by the confusion which actually existed in the enforcement of a carrier's liability for loss or damage to freight shipments prior to the enactment of the amendment of June 29, 1906.

"Prior to that amendment", says this court in *Adams Express Co.* v. *Croninger,* 226 U. S. 491:

> the rule of carriers' liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law, as declared by this court and enforced in the Federal courts throughout the United States (*Hart* v. *Pennsylvania R. Co.,* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151), or that determined by the supposed public policy of a particular state (*Pennsylvania R. Co.* v. *Hughes,* 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132), or that prescribed by statute law of a particular state (*Chicago, M. & St. P. R. Co.* v. *Solan,* 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289).
>
> Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. * * *
>
> That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern P. R. Co.* v. *Washington,* 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Southern R. Co.* v. *Reid,* 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; *Second Employers' Liability Cases* (*Mondou* v. *New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169.

The Act under consideration in the foregoing case expressly provided that the common carrier receiving property for transportation should issue a bill of lading therefor and should be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any connecting carrier. The Act of June 29, 1906, providing for the issue of free interstate transportation, is silent on the subject of the liability of the pass holder for personal injuries, but this is no answer to our contention that the Federal authority has taken over the entire subject of free interstate transportation, including the stipulations upon which it may be issued, and their validity.

The decision of this court in *Postal Telegraph Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27, is ample authority for this statement. There the question was whether a contract limiting the liability of a telegraph company for error in sending an unrepeated interstate message to the refunding of the price paid for the transmission of the message, should be determined by the law of the State or by the law which obtained in the Federal courts. Under the law of the State the contract was void. The State court, where the case was tried, applied the State law, held the contract invalid, and rendered judgment against the Telegraph Company. The sole question presented, when the case came to this court, was whether Congress by the Act of 1910, bringing telegraph companies under the Act to Regulate Commerce, occupied the entire field to the exclusion of State control. It will be noted that the Act of 1910 went no further than to enact that the provisions of the Interstate Commerce Act should apply to "telegraph, telephone, and cable companies engaged in sending messages" from one state to another, specifying that the charges for the

service shall be reasonable, and that messages by telegraph may be classified into day, night, repeated, unrepeated, commercial, press, Government, and such other classes as are just and reasonable, and that different rates may be charged for different classes of messages. There is no language in the Act touching the liability of telegraph companies for failure properly to transmit messages, or the validity of contracts which they may make respecting the same. The following was the contention of respondent, as appears from his brief (which is substantially the view taken by the Supreme Court of Missouri in this case), (64 L. ed. 119):

> Until specific action by Congress regulating the liability of telegraph companies to their patrons in respect to interstate commerce, the laws of the states are applicable.

But this court held that Congress by the Act of 1910, above summarized, had occupied the entire field of the interstate business of telegraph companies, including the validity of stipulations affecting liability for negligence in transmitting messages, so as to exclude State action. The court said:

> In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, —a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.

Not only are the contracts of a telegraph company limiting its liability in the transmission of interstate messages removed from the control of State authorities, but even the delivery of messages to their addressees after their receipt in the state is likewise free from state control. The State of Indiana undertook to impose a penalty upon telegraph companies for failure to deliver promptly interstate telegrams arriving in that state, but this court held (*Western Union Tel. Co. v. Boegli*, 251 U. S. 315), that the Act of 1910 completely deprived the states of all power to legislate on the subject of interstate telegrams, the decision being reflected in the following syllabus (64 L. ed. 282):

> Congress has so far taken possession of the field by enacting the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, as to prevent a state from thereafter penalizing the negligent failure of a telegraph company to deliver promptly an interstate telegram in that state.

Similarly, it has been held by this court that the Federal Employers' Liability Act has occupied the entire field with respect to the liability of carriers for damages to employees, to the exclusion of State control. Thus, a state statute which provides that in actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be deemed *prima facie* evidence of negligence, is invalid (*New Orleans R. Co.* v. *Harris*, 247 U. S. 367); a local Workmen's Compensation Act is invalid in the case of employees injured while engaged in interstate commerce (*New York Central R. Co.* v. *Winfield*, 244 U. S. 147); State statutes undertaking to abolish assumption of risk as a bar to an action are invalid (*Seaboard Air Line R. Co.*

v. *Horton,* 233 U. S. 492; *Pryor* v. *Williams,* 254 U. S. 43).

In section 22 of the Act, *supra,* it is provided "that nothing in this Act shall apply to * * * the issuance of mileage, excursion or commutation passenger tickets." It will be noted that there is nothing in the Act limiting the transferability of this form of transportation or otherwise prescribing the terms or conditions on which it may be issued. The same argument that is made by the respondent in the case at bar might be urged in support of the proposition that as the statute was silent touching the transferability of these tickets, that subject was not taken over by Congress, but remained subject to State regulation. But this court, in *Bitterman* v. *Louisville & N. R. Co.,* 207 U. S. 205, decided otherwise, holding that the issuance of these passenger tickets having been authorized by Congress, there arose by necessary implication from the language employed and by reason of the uniformity sought to be established thereby the right and the duty of the railway company to make them non-transferable.

The stipulation against liability contained in the pass on which the plaintiff was riding was a contract entered into pursuant to Federal authority. The Hepburn Act permitted carriers to issue free interstate transportation to employees and their dependents, and, by necessary implication, to issue such transportation on the usual and customary conditions. In authorizing the issuance of a free pass, Congress likewise authorized this inseparable incident to all free transportation. The parties to a contract authorized by an Act of Congress, such as the stipulation in this case, are entitled to have its validity determined and its terms construed in accordance with the rules which obtain in the national courts to the exclusion of the rules which

obtain in State and local courts. Such is the ruling of this court in *Tullock* v. *Mulvane*, 184 U. S. 497, where an injunction bond had been given in the Federal court, and in an action upon the bond in the State court, it was sought to apply the local law permitting a recovery of attorney's fees for procuring a dissolution of the injunction. The State court permitted a recovery, but the judgment was set aside by this court, which expressed its views in the following pertinent language (pp. 512-513):

> For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law. To hold the contrary, as we have previously pointed out, would be but to declare that although the power conferred by Congress upon this court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them, as expounded by this court and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a state court of a question of local or of general law involving no Federal element does not as a matter of course present a Federal question. But where, on the contrary, a Federal element is specially averred and essentially involved, the duty of this court to apply to such Federal question its own conceptions of the general law we think is incontrovertible. *Avery* v. *Popper*, 179 U. S. 305, 315, 45 L. ed. 203, 207, 21 Sup. Ct. Rep. 94.

In the Carmack amendment of June 29, 1906, it is provided that the carrier receiving a shipment shall issue a bill of lading and that the initial carrier shall assume not only its own responsibility for loss or damage, but that of any connecting carrier. The statute provides for the issuance of a "bill of lading", but does not specify any of its terms or conditions, precisely as the statute in the case at bar provides for the issue of free interstate transportation, but without specifying any of the terms or conditions upon which it is to be issued. But in the former case it is ruled that Congress in providing for the issuance of bills of lading and the assumption of liability on the part of the initial carrier has drawn to itself jurisdiction of all the terms and conditions which the bill of lading contains (*Cincinnati R. Co.* v. *Rankin,* 241 U. S. 219; *Missouri, Kansas & Texas R. Co.* v. *Harriman Bros.,* 227 U. S. 657). Are we not completely justified, therefore, in insisting that when Congress took over the issuance of free interstate passes, it likewise took over all the terms or conditions or stipulations contained therein, and reserved to its system of jurisprudence the exclusive right of determining their validity?

It is respectfully submitted that the judgment of the Supreme Court of Missouri was erroneous and should be reversed.

New York, October 10, 1922.

SAMUEL W. MOORE,
FRANK H. MOORE,
CYRUS CRANE,
Attorneys for Petitioner.

ANSWER AND AUTHORITIES AND BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF CERTIORARI.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. [redacted]142

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

ON PETITION FOR WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

CHARLES H. MONTGOMERY,
Attorney for Respondent.

NORMAN A. COX, and
HUGH DABBS,
Of Counsel.

(28,418)

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No. 463.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

ON PETITION FOR WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI.

Elizabeth Van Zant, by her attorney, answering the petition for writ of certiorari herein filed by The Kansas City Southern Railway Company, respectfully represents as follows:

(1) The judgment of the state trial court is supported on sufficient ground independent of any Federal question claimed to have been raised. The contract of release for accident and damage pleaded as a defense by petitioner does not contain any provision releasing petitioner from liability for its negligence.

(2) Points 8, 9 and 10 of petitioner's application are raised too late, being raised for the first time in this court, and never having been presented to the trial court or to the Missouri Supreme Court.

(3) Section 8563, paragraph 5, U. S. Compiled Statutes for 1916, the so-called free-pass provision of the Hepburn Act, urged by petitioner as its sole defense to its liability for negligent injury of respondent, does not legislate as to the question of liability of a carrier for negligent injury to a person riding on an interstate free pass; neither does it legislate as to the matter of a contract between the carrier and the person riding on the pass concerning such liability. Congress not having legislated on these matters, the State of Missouri is left free to apply its local laws as to such liability for injury to a passenger within its borders, and to apply its local laws as to the validity of a contract concerning such liability.

The question and issue urged by defendant in the trial court and in the Supreme Court of Missouri, as a defense to plaintiff's action for admitted negligent injury, is a non-Federal one, and was so decided against applicant for certiorari in the state court, and no right,

title, privilege or immunity under Federal Law was specially set up in the state court by defendant which was denied by that court.

(a) The cases relied upon by petitioner do not support its theories for the reason that in those cases the question in issue here was not before this court for determination, and was not passed upon.

(b) This court has never held that Congress, by the Hepburn Act, has taken over the field of liability of a carrier for negligent injury to a person riding on a free interstate pass, or the question of the right of the carrier to contract with the passenger concerning such liability, and these matters, in cases arising and tried in the state court for negligent injury within its borders, are controlled by state law or the application of the common law as interpreted by the state court.

(c) In determining the validity of such contract concerning the carrier's liability for its negligence, this court has distinguished between cases which arise *nisi* in Federal Court, where the contract of release is held valid by Federal interpretation of the common law and not by an application of the Hepburn Act, and cases which are tried *nisi* in state court for negligent injury to a passenger within the borders of the state, and which come to this court by certiorari or writ of error to the state court, in which instance this court applies the local or state law as to the liability and the validity of the contract, and confines its review to the question as to whether or not the state court, in applying its local law,

has misinterpreted or misapplied some Federal question directly arising in connection therewith.

Wherefore, respondent prays that the petition for certiorari be dismissed, with costs.

Charles F. Montgomery.
Attorney for Respondent.

NORMAN A. COX and
HUGH DABBS,
Of counsel.

SUGGESTIONS AND BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This action was commenced some four years ago in the Circuit Court of Jasper County, Missouri. Respondent here, as plaintiff, charged that while riding on defendant's train as a passenger, in Missouri, she was injured through the *negligence of defendant.*

It is undisputed that defendant (the petitioner here) was an interstate carrier of passengers and that plaintiff received her injury, *in the State of Missouri,* while riding on a pass issued by defendant to her minor son (an employee of defendant *who lived with plaintiff in her household*) for her use, without pay, for an interstate journey from Pittsburg, Kansas, through Missouri, to Howe, Oklahoma.

The sole defense pleaded and relied upon was "that plaintiff received her injury while on an interstate journey riding on a free pass issued under Article Five of the Federal Law known as the Interstate Commerce Act, which permits the issuance of said free transportation to employees of railroad companies and their families;" that the pass contained a stipulation on the back that "the person accepting and using it, thereby assumes all risk *of accident* and damage to person

and baggage;" that said pass, "being interstate, issued under the *Federal law above mentioned,* is to be interpreted and controlled in its effect and operation by decisions of the *Federal Courts construing said Federal Act;*" "that under said decisions the conditions on said pass above quoted are valid and binding on the plaintiff and by reason thereof, plaintiff having assumed all risk of accident and damage to her person is precluded and prevented from recovering damage on account of the matters and things alleged in her petition" (Pleading, by inference, that she assumed the *risk of negligence* of defendant.)

(Trans, pp. 4-5, folios 8-9.)

Replying, plaintiff *denied* that she assumed the risk of accident or damage to her person *due to defendant's negligence;* alleged that her action was based upon, and was to be determined by, the law of the State of Missouri, in the court and under the laws of which state the action was brought, and was not based on Federal statute or law; that the stipulation on the back of the pass, if it is urged to relieve defendant from liability for its own *negligence,* was void both under the law of Kansas, where the pass was issued, and the law of Missouri, where the injury occurred (Trans. 5-6-7, folios 10 to 13).

It was, and is, conceded by defendant (applicant for certiorari) that under the law of both Kansas and Missouri, a contract or stipulation on the part of a common carrier to limit or relieve itself fom liability

for damages to a passenger caused by the *carrier's negligence* is void.

The record shows that plaintiff was thrown from her seat in defendant's train by a wreck or derailment, and injured. Under Missouri law, this not being contradicted by evidence to the contrary, raises a presumption of negligence on the part of the defendant.

Norris v. *Railway*, 239 Mo. 695, l. c. 715.
Partello v. *Mo. Pac. Ry.*, 240 Mo. 122.

There was no dispute as to defendant's negligence in the trial court, and only such part of the record as affected the single question appealed on was printed by defendant.

The trial resulted in a general judgment in plaintiff's favor.

In its motion for a new trial, defendant did not present or preserve any constitutional point, and the only point presented and claimed to involve a Federal question was that the court erred in refusing to follow the law of the Federal Courts construing said *Article Five* (U. S. Compiled Stats., 1916, Sec. 8563), so pleaded by defendant, in determining the validity of the stipulation on the back of the pass.

In its assignments of error in the Appellate Court, defendant, in addition to the point preserved in its motion for new trial as above stated, presented this one point somewhat differently by assigning that the court erred in refusing to instruct that under Federal law (re-

ferring to the free pass provision of the Hepburn Act) the stipulation on the back of the pass was valid and binding.

Under Missouri practice only such points as are made issues and are called to the attention of the trial court in a motion for new trial, and are carried into an assignment of errors, and presented to the Appellate Court as distinct points, may be considered on appeal, and points not so preserved are waived.

Powell v. *Jackson County*, 262 Mo. 403.

On certiorari, the United States Supreme Court follows the same practice with the single exception that where some Federal question is presented in some other way to the state Appellate Court, and both sides are heard thereon and the state Appellate Court passes on the specific question, then it may be considered on certiorari.

Hiawasa Power Co. v. *Carolina-Tenn. Co.*, 252 U. S. 341-344.

In the present case, with this single question before it on appeal, the Missouri Supreme Court held that:

> "Congress has not legislated on the subject of the *rights* and *liabilities* of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act (Article Five, of Interstate Commerce Act relied upon by defendant) or *respecting the validity* of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several states."

Applying this local law, the court held that a stipulation relieving the carrier from liability for negligence was void.

Defendant filed in the Missouri Supreme Court a motion for a rehearing, making but the single point that the above holding of the court was wrong, and contending that certain Federal decisions cited by it, construing the above Act of Congress, held that Congress had taken over the entire subject matter of the questions in issue (*i. e.*, as to liability and as to the validity of the stipulation) to the exclusion of the states. This was the same point originally made in the Missouri Supreme Court, and the motion was overruled.

POINTS IN OPPOSITION TO CERTIORARI AND ARGUMENT IN SUPPORT THEREOF.

Certiorari should not issue for the following reasons:

1. The judgment of the trial court in plaintiff's favor is supported by sufficient ground, on the issues made, entirely outside of and independent of any Federal question claimed to have been raised in the case, and petitioner never appealed on this issue.

Defendant pleads *in haec verbae* a contract on the back of the pass as a defense to its liability to plaintiff for *defendant's negligence* resulting in plaintiff's injury. This contract so pleaded (Trans. 5, folio 9), on its face shows that it *does not contain* any provision releasing defendant from liability to plaintiff *for its negligence*, but only from liability for *accident* and damage to her person and baggage. Plaintiff *denies* that the stipulation or contract relieved defendant from liability to her for injuries *caused by defendant's negligence*. (Trans. pp. 6-7, folios 10 and 12.) Independent of the general denial in defendant's answer, plaintiff was entitled to judgment on the pleadings.

Accident, as used in this stipulation, is defined by this court in *Chicago, etc., Railroad Company* v. *Pullman Company*, 139 U. S., l. c. 86, as follows:

> "Accident or casualty, according to a common understanding, proceeds from an unknown cause, or is an unusual effect from a known cause."

"Accident is generally defined as an unusual and unexpected event happening without negligence."

Corpus Juris, Vol. 1, Sec. 5, pp. 392-393.

Thus the stipulation as to non-liability for *accident* and damage to plaintiff's person does not relieve defendant as to liability for damage to plaintiff's person *caused by the negligence of defendant,* as the parties did not contract with respect to defendant's liability for negligence.

In this respect the stipulation differs from those in the following cases cited by defendant:

New York Central R. R. Co. v. *Mohney,* 252 U. S. l. c. 153.

Charleston & West. Car. Ry. Co. v. *Thompson,* 234 U. S. 577.

Northern Pac. Ry. Co. v. *Adams,* 192 U. S. l. c. 442.

Boehring v. *Chespeake Beach Ry. Co.,* 193 U. S. l. c. 448.

In each and all of which cases the contract of release on the back of the pass contained, in substance, the specific provision that the party accepting the free pass agreed that the defendant carrier should not be liable for damage or injury to person *caused by the negligence* of the agents of such carrier.

Where, as here, the judgment of the trial court can be sustained on a ground independent of a Federal question, this court will refuse to review it on certiorari or otherwise.

Southern Pac. Ry. v. *Schuyler,* 227 U. S. l. c. 612.

2. Points 8 and 10 of defendant's application for certiorari, found at pages 5 and 6 of its application and brief, are urged *for the first time* in this court, and were never presented to the trial court or to the Missouri Supreme Court on appeal. Even if they had any merit, they are raised too late.

The title, right, privilege and immunity claimed to have been denied to the applicant for certiorari must have been *specially set up and claimed in the trial court and the Missouri Supreme Court*, and where not so set up, will not be considered by this court on application for certiorari.

> *Hiawasa Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. l. c. 341-344.
> *Cincinnati, etc., Ry.* v. *Pless*, 216 U. S. 78.
> *Chemical Bank* v. *Bank*, 160 U. S. 646.

3. *Even if* the pass had contained a stipulation relieving defendant from liability *for negligent injury* to plaintiff (and we have shown under our point 1 that it did not), yet the point is made:

> "Congress has not legislated on the subject of the *rights and liabilities* of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act (Article 5 of the Interstate Commerce Act pleaded by defendant as controlling (or *respecting the validity* of stipulations or conditions annexed to such passes exempting the carrier from liability, and therefore, these matters *remain the subject of regulation by the several states.*"

Southern Pac. Co. v. *Schuyler,* 227 U. S. l. c. 610-612.

C. R. I. & P. Ry. v. *Maucher,* 248 U. S. 359. 359.

Weir v. *Rountree,* 173 Fed. l. c. 779-781.

Smith v. *A. T. & S. F. Ry. Co.,* 203 U. S. 284.

Fowler v. *Penn. R. R. Co.,* 229 Fed. l. c. 375.

Wiley v. *Grand Trunk Ry. Co.,* 227 Fed. l. c. 129.

Beutler v. *Grand Trunk Ry. Co.,* 224 U. S. l. c. 85.

Clark v. *Southern Ry. Co.,* 119 N. E. 539.

Sec. 8563, paragraph 5, page 9069, U. S. Compiled Statutes for 1916, Anno. (West P. Co. Edition).

Points 5, 6, 7 and 9, urged by applicant for certiorari, in effect, simply deny the above proposition, and set forth that *said Act of Congress* (U. S. Stats. Sec. 8563) has taken over the *entire field of liability* as to persons riding on interstate free passes, and the entire field as to the validity of contracts connected with such passes relieving the carrier from liability *for its own negligence.* Urged in connection with this is the statement that decisions of the Federal Courts and this court have so construed *the act in question,* and that because thereof the State of Missouri is precluded from applying its local law as to liability and the rulings by its state courts as to the validity of a contract releasing the carrier from liability for its negligence.

On the contrary, the case of *Southern Pacific Ry. Co.* v. *Schuyler,* 227 U. S. l. c. 612, holds that the question of the carrier's liability and the question of the validity of the contract of assumed risk of the carrier's negligence *are not to be determined by the provisions of the Hepburn Act, but by the provisions of the local or state law where the accident occurred.*

Defendant cites the cases of *Charleston & West-Carolina R. R. Co.* v. *Thompson,* 234 U. S. 576, and *New York Central Ry. Co.* v. *Mohney,* 252 U. S. 152, as being to the effect that this court has held that Congress, by the Hepburn Act, has taken over the entire field as to liability of the carrier for injury to a passenger riding on an interstate free pass and of the validity of a contract connected therewith stipulating as to such liability. We do not so read these cases. They do not invoke the Hepburn Act to determine the liability of the carrier nor the validity of the stipulation, and they could not do so, because this court has already held, in the Schuyler case above cited, that the Hepburn Act does not deal with these questions. They invoke the Hepburn Act simply to determine

(1) Whether the pass is a free pass, and

(2) Whether the person using it comes within the prohibited class.

These two questions are not involved in the present case.

The case of *New York Central Ry. Co.* v. *Mohney,* 252 U. S. 152, l. c. 154-157, is distinguished from the present case *by the issues made and the questions before this court.*

The state Appellate Court held that Mohney, when injured, was an *interstate* passenger, and affirmed the judgment of the trial court on two grounds: (1) that the pass was issued for a consideration; (2) that the negligence of the carrier was willful and wanton; that for these reasons the release on the pass did not constitute a defense to the action, *which was brought in the state court originally.*

This court held the journey to be *intrastate,* and as the power of Congress to deal with commerce applies only to *interstate* commerce, a construction of an Act of Congress *could not be involved in this regard* (l. c. 157).

As to the question of willful or wanton negligence, the court refused to pass on the weight of the testimony (l. c. 157).

As to the holding that the pass was issued for a consideration, the court refused to rule or to take up the application of the case of *Charleston & West Carolina Ry.* v. *Thompson,* 234 U. S. 576, as to whether the pass was free, as the case had already been disposed of.

This case *does not pass upon the question,* and the question *was not before the court as to whether Congress has legislated on the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or*

conditions annexed thereto exempting the carrier from liability. Neither was the question of liability due to the fact that the carriage was interstate before the court, or passed upon.

Charleston & West Carolina Ry. Co. v. *Thompson,* 234 U. S. 576, is distinguished *on the facts.* In Georgia, where that case was *tried nisi in the state court,* the state law makes a stipulation on the back of a free pass (either *inter*state or *intra*state) exempting the carrier from liability for its negligence, *binding,* while in Missouri, where the accident occurred in the case now before the court, and in Kansas, where the instant pass was issued, the state law renders such a stipulation *illegal and unenforcible.* Admitting the provisions *of its own state law* made the release *valid,* where the pass was free, the state court of Georgia held that the pass in question in that case, *clearly issued under the provisions of the Hepburn Act, was not, in fact, free.* The only issue that came before this court being: *"Was the pass free?"* (l. c. 577.) This court held that, under the Hepburn Act, *the pass was free,* and that *under the law of the State of Georgia,* the stipulation, in connection with a *free pass,* was *conceded to be binding.*

We believe that confusion has arisen in the mind of counsel for defendant here due to the fact that they have failed to take into consideration the distinction made by the Federal Courts between cases which are *tried nisi in Federal Court* and cases which are *tried nisi in a state court,* and which come into this court by way of certiorari or writ of error. Where the case is tried *nisi* in the

Federal Court, that court applies its own construction of the *common law* on the questions involved, while in cases *tried nisi in the state court,* and coming to this court on writ of error, this court *confines its review to the Federal rights or immunities alleged to have been infringed,* and cannot consider the correctness or incorrectness of the conclusions of the lower court, *insofar as they are merely concerned with questions of state law, statutory or common.*

Williams, Jurisdiction and Practice of Federal Courts, page 193, paragraph 4.

Southern Pac. Ry. Co. v. *Schuyler,* 227 U. S. l. c. 610-612.

Weir v. *Rountree,* 173 Fed. l. c. 779.

Smith v. *A. T. & S. F. Ry.,* 194 Fed. l. c. 81.

Fowler v. *Railroad,* 229 Fed. l. c. 374-5.

Tweeten v. *Railroad,* 210 Fed. l. c. 830-31.

Charleston, etc. Ry. v. *Thompson,* 234 U. S. 576.

Beutler v. *Grand Trunk Ry.,* 224 U. S. l. c. 85.

This rule was followed in the case of *Charleston, etc. Ry.* v. *Thompson,* above mentioned which came into this court by way of writ of error from the state court of Georgia. The only Federal question involved was the character of the pass as to whether it was free or not. It was held to be free under the Hepburn Act, which defines a free pass. The court stated that as the pass was free, *the Georgia State Court conceded* the provisions of the stipulation to be *valid* the same as does the Federal interpretation *of the common law* in the cases of *Northern Pac. Ry. Co.* v. *Adams,* 192 U. S. 440, and *Boering*

v. *Chespeake Ry.*, 193 U. S. 442, which were both *tried nisi in Federal Court* and *before the Hepburn Act in question was passed by Congress.* This case, as to the validity of the stipulation, simply holds that the *state or local law of Georgia on the subject is the same as the Federal interpretation of the common law.*

The case *does not hold* that the Hepburn Act has anything to do with the question of *liability of a carrier* for negligent injury to a person riding on an interstate free pass, *or with the question of the validity of a stipulation as to such negligence* entered into in connection with such pass. *Neither does it hold that Congress, by this Act, has taken over the entire field of liability to the exclusion of state or local law.*

Telegraph and Employers Liability Cases.

The telegraph and Federal Employers Liability cases do not support applicant's position.

With respect to interstate commerce by telegraph, Congress has legislated *specifically and exclusively* as to *classification of service* and *uniformity of rates* for the same class of service throughout the various states. The telegraph cases have arisen in one of two ways: either the state law has imposed a penalty for erroneous transmission of an unrepeated message, or has imposed a penalty for failure to deliver or to deliver promptly. In holding that the several states no longer have this right with respect to *interstate messages*, the Federal decisions and decisions of this court have given the uni-

form reason that Congress has, by *express enactment,* taken over the whole subject of *classification of service* and *uniformity of rates,* and to allow the different states to impose different penalties for erroneous transmission of unrepeated messages (or for any class) would work a destruction both of the *uniformity of classification* and the *uniformity of rates* throughout the various states. Likewise, owing to the peculiar nature of interstate telegraphic communication, it is impossible to tell in what state the violation (or tort) occurred, and as most of the laws are aimed at a failure to deliver, which must take place *in another state,* the laws are *extra territorial in effect,* and therefore clearly beyond the power of the state.

On the contrary, with regard to the present case, the enforcement of the state law as to liability of a carrier for negligent injury within the borders of the state to a person riding on an interstate free pass, and as to the validity of a contract of release from such negligence entered into in connection therewith, cannot affect, *even remotely,* the only two questions dealt with in the section of the Hepburn Act relied upon by defendant, namely:

1. What constitutes a free pass?
2. To whom may a free pass be issued?

The cases cited by applicant under the heading "Assumption of Risk," page 17 of its application and brief, come under the Federal Employers' *Liability Act,* and the title to the Act itself demonstrates that *Congress has*

legislated on the subject of liability. Not only this, but it has legislated as to where actions may be brought, and *what may and may not be set up as a defense.* This is a very clear illustration of where Congress has taken over and created the *entire field of liability.* The question of assumption of risk as a defense is the subject dealt with in the case of *Pryor* v. *Williams,* 41 Sup. Ct. Reporter, No. 4, p. 36, and as Congress has dealt specifically with the question of *assumption of risk* under this title, the case property holds that by the term, assumption of risk, Congress meant to deal with the Federal idea of what constitutes such a risk, and not with a doctrine which is peculiar to Missouri alone.

Conclusion.

To justify the issuance of certiorari under the issues in this case, the court would, of necessity, hold one of two things:

1. That Congress, by the provisions of the Hepburn Act—defining what constitutes a free pass, to whom the same may be issued, and the penalty for issuance to or use by one not entitled thereto—has taken over the entire field of liability of a carrier for negligent injury to a person riding on a free interstate pass, together with the right of the carrier by contract to exempt itself from such liability;

or

2. That the *interstate* character of the passage precludes the state from imposing liability for negligent injury to the passenger within its borders.

As to proposition 1, no language of the Act justifying such an interpretation has been pointed out by defendant carrier or by any court.

This court has repeatedly held that while Congress, under the Federal Constitution, may so legislate as to interstate commerce as to exclude state legislation, or the application of state rules *on the same subject*, yet, until Congress *has so legislated on the particular subject* in such a way as to show an intention to take over the entire field, the states are left free to apply their local laws for acts of misfeasance or non-feasance within their borders, although interstate commerce may be indirectly affected thereby.

Adams Express Co. v. *Croninger*, 226 U. S. 491.

Southern Pac. Ry. Co. v. *Jensen* (opinion of Justice Pitney), 244 U. S. 1. c. 244-246.

Pennsylvania R. R. v. *Hughes*, 181 U. S. 477.

Cases cited in *Adams Ex. Co.* v. *Croninger*, above.

Minnesota Rate Case, 230 U. S. 352.

Milwaukee, etc. Ry. v. *Sloan*, 169 U. S. 133, holds that such local laws are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress *has not legislated upon the particular subject*, they are to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

. To illustrate this point by an application of the Carmack Amendment, dealt with in the above cases:

> "While the original Interstate Commerce Act, and the amendments thereto, which are commonly referred to as the Elkins Act, and the Hepburn Act, regulated many phases of interstate commerce, *they did not attempt to fix any rules as to the power of a common carrier engaged in interstate commerce, to modify his common law liability, by express contract;* and such power was therefore regulated *by state law*, either written or unwritten."
>
> Page on Contracts, p. 1297, par. 744.

And so it was held in the cases last above cited that until Congress passed the Carmack Amendment, legislating exclusively on the subject of *liability* of the carrier for loss of *merchandise*, and the right to *limit liability by contract*, the states were left free to apply their local laws for matters within their borders, even though in so doing interstate commerce was incidentally affected.

And, in *Chicago, R. I. & Pac. Ry.* v. *Maucher*, 248 U. S. 359, this court, *in upholding a decision based on a local law of the State of Nebraska*, held that the freedom of the states to establish and apply their own laws and policies touching the validity of contracts exempting carriers *from liability to passengers for injuries due to negligence*, was not affected by the Carmack Amendment, which deals only with shipments of property, and that "Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons."

It is worthy of note that the provision of the Interstate Commerce Law, urged by defendant as a defense, was in force at the time of this decision.

Moreover, Congress is the *only body* that has the power to take away this state right, and this can be done only by express legislation on the same subject.

Minnesota Rate Case, 230 U. S. 352.

Notwithstanding this express ruling, *applicant for certiorari is asking this court to judicially legislate* into the Hepburn Act something that Congress did not put there.

As to the second proposition above—that the *interstate character* of the passage excludes the right of the state to impose liability for negligent injury to a passenger within its borders—should this view be taken (which is contrary to the decisions of this court above referred to), then the same rule would apply to a passenger *for pay* on an interstate journey, and an interstate railroad would constitute a broad highway through the several states not subject to any state law for local misfeasance or nonfeasance, and with no provision made by Congress for the protection of the passenger.

The petitioner suggests that the language of Judges VanDeventer and Day, in their concurring opinion in *New York etc., Ry. Co.* v. *Mohney,* justifies this contention, but we do not believe the judges in question so intended. Judge VanDeventer, in the case of *Weir* v. *Rountree,* 173 Fed. 780, sitting with Judges Munger and Sanborn, held quite the contrary, it being the opinion of the court in that case, that, absent express congressional legislation on the subject:

> "A carrier exercising his calling within a particular state, *although engaged in business of interstate commerce,* is answerable according to the *law of the state* for acts of nonfeasance or misfeasance committed *within its limits.* * * * The state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, *a contract to the contrary notwithstanding.*"

We also believe that in view of the question actually raised in the present case, this language will be explained by the court as *limited to such cases as are tried originally in Federal Court,* where the Federal Court applies its own interpretation of the common law, *and not applicable to a case tried nisi in a state court, under state law, for negligent injury to a person within its borders,* where a non-Federal question is involved.

The pass in question is free, but would not be so as defendant would attempt to construe it and use it. As a passenger, plaintiff would have her right of action for negligent injury. She would be entitled to safe carriage. Whenever any part of this right is taken away from her in exchange for the privilege of riding without *monetary consideration,* value is given for carriage and it would no longer be a *free* pass as contemplated by Congress in the Hepburn Act. It will be noted that Congress, in defining a free pass, does not say anything as to a contract as to liability for negligent injury to the person riding on it, or grant any authority to limit the right of carriage as distinguished from any other passenger. The pass, in contemplation of Congress, is a

free pass indeed, given without monetary consideration, and taking away from the person using it *none of the rights enjoyed by any other passenger.*

This is a demonstration that Congress did not, by the Hepburn Act, legislate on the subject of liability of the carrier for negligent injury to a person riding on a free pass, or on the subject of a contract as to such liability; otherwise it would provide a consideration for a pass which it defines as free.

Other points urged by applicant simply state parts of the evidence.

In conclusion, we do not believe that the applicant has shown this case to be one of such public interest, gravity and importance as to command the time and attention of this court. It cannot materially affect the rights of defendant for the reason that it is not compelled to issue passes neither does the stipulation affect any other than the plaintiff and defendant in the present case, and the judgment was for a comparatively small amount.

Respectfully submitted,

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